Democracy Unchained

Author : Frank Pasquale

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K. Sabeel Rahman, *Private Power, Public Values: Regulating Social Infrastructure in a Changing Economy*, 39 **Cardozo L. Rev.** 5 (forthcoming, 2017), available at SSRN.

In the mid-2000s, digital activists spearheaded the net neutrality movement to ensure fair treatment of the customers of Internet Service Providers (ISPs), as well as to protect the companies trying to reach them. Net neutrality rules limit or ban preferential treatment; for example, they might prevent an ISP like Comcast from offering exclusive access to Facebook and its partner sites on a "Free Basics" plan. Such rules have a sad and tortuous history in the US: rebuffed under Bush, long delayed and finally adopted by Obama's FCC, and now in mortal peril thanks to Donald Trump's elevation of Ajit Pai to be chairman of the Commission. But net neutrality as a popular principle has had more success, animating mass protests and even comedy shows. It has also given long-suffering cable customers a way of politicizing their personal struggles with haughty monopolies.

But net neutrality activists missed two key opportunities. They often failed to explain how far the neutrality principle should extend, as digital behemoths like Google, Facebook, Apple, Microsoft, and Amazon wielded extraordinary power over key nodes of the net. Some commentators derided calls for "search neutrality" or "app store neutrality;" others saw such measures as logical next steps for a digital New Deal. Moreover, they did not adequately address key economic arguments. Neoliberal commentators insisted that the US would only see rapid advances in speed and quality of service if ISPs could recoup investment by better monetizing traffic. Progressives argued that "something is better than nothing;" a program like "Free Basics" probably benefits the disadvantaged more than no access at all.

In his *Private Power, Public Values: Regulating Social Infrastructure in a Changing Economy*, K. Sabeel Rahman offers a theoretical framework to address these concerns. He offers a "definition of infrastructural goods and services" and a "toolkit of public utility-inspired regulatory strategies" that is a way to "diagnose and respond to new forms of private power in a changing economy," including powerful internet platforms. He also gives a clear sense of why the public interest in regulating large internet firms should trump investors' arguments for untrammeled rights to profits—and demands "public options" for those unable to afford access to privately controlled infrastructure.

Law's treatment of infrastructure has been primarily economic in orientation. For example, Brett Frischmann's *magnum opus, Infrastructure: The Social Value of Shared Resources,* offered a sophisticated theory of the spillover benefits of transportation, communication, environmental, and other forms of infrastructure, building on economists' analyses of topics like externalities and congestion costs. Rahman complements this work by highlighting political and moral dimensions of infrastructure. The early 21st century Progressive movement did not seek to regulate utilities simply because a large firm may not be efficient. They also worried directly about the *power* exercised by such firms: their ability to influence politicians, take an outsized share of GDP, and sandbag both rival firms and political opponents. As Rahman explains, "Industries triggered public utility regulation when there was a combination of economies of scale limiting ordinary accountability through market competition, and a moral or social importance that made the industries too vital to be left to the whims of the market or the control of a handful of private actors."

Identifying the list of "foundational goods and services" meriting direct utility regulation is inevitably a mix of politics, science, and law. Determining, for example, whether broadband internet should be treated in a manner similar to telephone service, depends on scientific analysis (e.g., might it soon become easier to provide internet over electric lines to complement existing cable), political mandates (e.g., voters electing Republicans at this point may be assumed not to prioritize broadband regulation, as party lines on the issue are relatively clear), and legal judgments (e.g., is

broadband so similar to wireline service that it would defeat the purpose of the relevant statutes to treat it far differently). This delicate balance of the "three cultures" of science, democracy, and law, means that the scope of utilities regulation will always be somewhat in flux. While the federal government is, today, chipping away at the category, future administrations may revive and expand it. If so, they will benefit from Rahman's rigorous definition of infrastructure as "those goods and services which (i) have scale effects in their production or provision suggesting the need for some degree of market or firm concentration; (ii) unlock and enable a wide variety of downstream economic and social activities for those with access to the good or service; and (iii) place users in a position of potential subordination, exploitation, or vulnerability if their access to these goods or services is curtailed."

Not just the scope, but also the content of public utility regulation has also evolved over time. As Rahman relates, three broad categories of regulation can provide a "21st century framework for public utility regulation:"

> 1) [F]irewalling core necessities away from behaviors and practices that might contaminate the basic provision of these goods and services—including through structural limits on the corporate organization and form of firms that provide infrastructural goods;
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> 2) [I]mposing public obligations on infrastructural firms, whether negative obligations to prevent discrimination or unfair disparities in prices, or positive obligations to pro-actively provide equal, affordable, and accessible services to under-served constituencies; and
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> 3) [C]reating public options, state-chartered, cheaper, basic versions of these services that would offer an alternative to exploitative private control in markets otherwise immune to competitive pressures.

These three approaches ("firewalls", "public obligations" and "public options") have all helped increase the accountability of private powers in the past (as Robert Lee Hale's work, praised as an inspiration in Rahman's, has shown). Cable firms cannot charge you a higher rate because they dislike your politics. Nor can they squeeze businesses that they want to purchase, charging higher and higher rates to an acquisition target until it relents. Nor should regulators look kindly on holding companies that would more ruthlessly financialize essential services (or the horizontal shareholding that functions similarly to such holding companies.).

There are many legal scholars working in fields like communications law, banking law, and cyberlaw, who identify the limits of dominant regulatory approaches, but are researching in isolation. Rahman's article provides a unifying framework for them to learn from one another, and should catalyze important interdisciplinary work. For example, it is well past time for those writing about search engines to explore how principles of net neutrality could translate into robust principles of search neutrality. The European Commission has documented Google's abuse of its dominant position in shopping services. Subsequent remedial actions should provide many opportunities for the imposition of public obligations (such as commitments to display at least some non-Google-owned properties prominently in contested search engine results pages) and firewalling (which might involve stricter merger review when a megafirm makes yet another acquisition).

Rahman also shows a critical complementarity between competition law and public utility regulation. Antitrust concepts can help policymakers assess when a field has become concentrated enough to merit regulatory attention. Both judgments and settlements arising out of particular cases could inform the work of, say, a future "Federal Search Commission," which could complement the Federal Communications Commission. The same problem of "bigness" that can allow a megafirm to abuse its platform by squeezing rivals, also creates opportunities to abuse users. Just as the Consumer Financial Protection Bureau serves a vital function

Many large internet platforms are now leveraging data advantage into profits, and profits into further domination of advertising markets. The dynamic is self-reinforcing: more data means providing better, more targeted services, which in turn attracts a larger customer base, which offers even more opportunities to collect data. Once a critical mass of

users is locked in, the dominant platform can chisel away at both consumer and producer surplus. For example, under pressure from investors to decrease its operating losses, Uber has increased its cut from drivers' earnings and has price discriminated against certain riders based on algorithmic assessments of their ability and willingness to pay. The same model is now undermining Google's utility (as ads crowd out other information), and Facebook's privacy policies (which get more egregiously one-sided the more the social network's domination expands).

Rahman offers us a rigorous way of recognizing such platform power, offering a tour de force distillation of cutting edge social science and critical algorithm studies. Industries ranging from internet advertising to health care could benefit from a public utility-centered approach. This is work that could lead to fundamental reassessments of contemporary regulatory approaches. It is exactly the type of research that state, federal, and international authorities should consult as they try to rein in the power of many massive firms in our increasingly concentrated, winner-take-all economy.

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